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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 560

BOARD OF SATANTA JOINT RURAL HIGH SCHOOL DISTRICT No. 2, WILLIAM H. HELTON and ELWIN ANTHONY, Individually and As Members of Said Board,
Appellants,

vs.

THE HASKELL COUNTY PLANNING BOARD and the Members Thereof, HAROLD LOWER, RUSSELL WINTERS, WESLEY LUCAS, CHARLES McDONALD, ELWIN ANTHONY and JOE STARKE, and ADEL THROCKMORTON, State Superintendent of Public Instruction,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF KANSAS.

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF KANSAS.

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of Kansas filed July 14, 1966, affirming a decision of the District Court of Haskell County, Kansas. Appel-

lants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The decision of the Supreme Court of Kansas is reported in Volume 197 of the Advance Sheets of The Kansas Reports at Page 321. A copy of that opinion is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is conferred by 28 U.S.C., § 1257(2).

QUESTION PRESENTED

Where the legislature has directed that the election process be invoked to determine whether the electors are in favor of, or opposed to a stated proposition, and the result of that election is in favor of the proposition, and a state administrative official is permitted to overrule the majority will duly expressed through the election process—Does a determination that the legislature may invoke the election process to function solely as an advisory device to a state administrative official constitute such an abuse of the election process so as to deny appellants due process of law?

STATUTES INVOLVED

Kansas Statutes Annotated, Article 67, entitled Unified School Districts, § 72-6734 *et seq.* and, in particular, § 72-6743, copies of which are attached hereto as Appendix B.

STATEMENT

The case at bar is a companion case to *Board of Satanta Joint Rural High School District No. 2 et al.* v. *Grant County Planning Board et al.*, which is presently docketed and pending on appeal in the United States Supreme Court as Case No. 1374, October Term, 1965.

In both cases the question presented herein was thoroughly briefed and argued. In both cases, appellants have strenuously contended that the legislation in question, as applied, is such a debasement of the election process so as to constitute a denial of due process to appellants herein. The position taken in opposition by the Attorney General of the State of Kansas is epitomized in his opening statement before the Supreme Court of Kansas. He stated that the election afforded by the statute was designed as a mere "relief valve", since *"The Legislature and everybody knows that the people do not know anything about school boundaries."* In affirming this case the Supreme Court of Kansas necessarily adopted and approved of this cynical view of the electorate and cavalier treatment of the electoral process upon which our government is based.

For the sake of clarity, the instant case will hereinafter be referred to as the *Haskell County* case, and its companion case will be referred to as the *Grant County* case. As acknowledged by the Supreme Court of Kansas:

> "The facts in the instant case are similar to those involved in the companion case. The issues of law appear to be identical in the two actions. . . ." (Appendix A, R. 17).

Both cases involve the constitutionality of Kansas Statutes Annotated, Article 67, entitled Unified School Districts, § 72-6734 *et seq.* and, in particular, § 72-6743 as construed by the Supreme Court of Kansas.

At all times material herein, a portion of the Red Rock Common School District, situated along the eastern edge of Grant County, Kansas, also formed a part of the territory of appellants' joint rural high school district. Section 10 of the School Unification Act of 1963, K.S.A. 72-6743 denominates such overlapping territory as a "gray-area" and prescribes special procedures for the transfer of such "gray-areas" to a county planning unit.

With respect to the transfer of such areas, K.S.A. 72-6743 provides that an election be held to determine the desires of the gray-area electors and describes the procedure to be followed in conducting the election. Among other things, the legislature required: (1) that the county school superintendent in which the main high school building is located call a "meeting of the electors of the gray-area"; (2) that notice be given to the resident electors of the gray-area advising them of the time and place of such meeting; (3) that the purpose of the meeting be explained to the resident electors and discussion be held concerning the matter of transfers; (4) that ballots be distributed to each elector; (5) that each elector present mark his ballot for or against the transfer of the territory; and, (6) that each ballot then be returned to the county superintendent and that "He shall count and tabulate the same and thereafter file such ballots in the public records of his office." In short, the Kansas legislature required the invocation of the traditional election process with which each American is familiar.

The statute further provides that in the event that a majority of the electors residing in a particular gray-area are in favor of the transfer of such gray-area to the planning unit where the main rural high school building is located, the two planning boards involved shall consider the

advisability of such a transfer. If either one, or both, of the planning boards are in favor of the transfer, "the same *shall be transferred, subject only to the approval thereof by the state superintendent* . . ."

Appellants' main high school building is located in Haskell County and pursuant to K.S.A. 72-6743, a special election was called by the County Superintendent of Schools of Haskell County for September 1, 1963. Notice of the election was posted and publicized. Eighty-five per cent of the resident "gray-area" electors attended. The question of transfer to the Grant or Haskell County Planning Unit was publicly debated. Ballots were issued and a secret vote held. A clear majority of the electors chose to transfer the gray-area to the Haskell County Unit. (R. 4-5) *Grant County* case.

In accord with K.S.A. 72-6743 the election results were certified to the Haskell and Grant County Planning Boards. The Haskell County Planning Board adopted a resolution favoring the transfer. The election results and the board resolution were then certified to the State Superintendent of Public Instruction.

The Superintendent, under a broad construction of the word "approval", did not "approve" of the *results* of the election, and issued an order refusing to transfer the gray-area in direct contravention of the electoral determination, and concurring resolution of the Haskell County Planning Board. (R. 87) *Grant County* case. This determination gave rise to the *Grant County* case now pending in this Court.

Thereafter, the Grant and Haskell County home planning boards each submitted to the State Superintendent of Public Instruction a plan pursuant to Section 11 of such Act, each of which plans defined proposed districts including the gray-area located in appellant's district. The Super-

intendent approved the plan of the Grant County Planning Board and disapproved Haskell County Board's plan, but such disapproval was not announced by the State Superintendent until after an election was held upon the plan of the Grant County Planning Board. (R. 4)

The Haskell County Planning Board then submitted another document to the Superintendent delineating the territorial extent and boundaries of unified school districts within an area which did not include the gray-area within appellant's school district. By such submission, the Haskell County Board did not make a recommendation as required by the Act, but on the contrary indicated that appellees had not had time to give the matter full consideration, that such submission was the product of duress, and was reported entirely under protest. (R. 4)

Notwithstanding the failure of the Haskell County Board to submit a recommended plan in accordance with law, said Superintendent ignored such failure and undertook to issue his "unconditional approval" of the purported plan submitted, treating the same as a recommended plan under Section 13 of the Act, and undertook to authorize the Board to hold an election on September 8, 1964, for approval of a purported plan, excluding appellants' gray-area territory. (R. 4)

Appellants then filed the instant action seeking a declaratory judgment determining the legality of such acts of the Superintendent and of the constitutionality of the legislation as applied. In addition, appellants requested a restraining order enjoining the Haskell County Planning Board from certifying the results of the scheduled election. (R. 2-6) The lower court issued a restraining order restraining such certification. (R. 6) However, the resident election of the "gray-area" voted against the purported plan

which excluded their gray-area territory from the Haskell County Planning Unit, and the Restraining Order was dissolved "without prejudice to any claims of any of the parties hereto. . ." (R. 6-7)

On October 7, 1964, appellants filed a class action claim on behalf of all of the resident electors of Satanta Rural High School No. 2 challenging the constitutionality of the legislation as applied. (R. 7-10) On October 4, 1965, the trial court granted appellees' motions for Summary Judgment and to dismiss. (R. 19)

Appellants appeal from a judgment of the Supreme Court of Kansas filed July 14, 1966, affirming the decision of the District Court of Haskell County, Kansas. The purpose of this appeal is to review the constitutionality of the legislation as applied.

The constitutional question was raised in the lower court (R. 2-20), and was acknowledged by the Kansas Supreme Court to be the same issue as presented by the *Grant County* case. In each case, the Supreme Court of Kansas ignored the issue, although it was thoroughly briefed and argued in each instance.

THE QUESTION IS SUBSTANTIAL

The issue presented by this appeal is whether the legislative use of the election process as a mere public opinion poll, straw vote, or "relief valve", violates due process of law. So far as we can tell, the question has never been decided by this Court.

The statement by the Attorney General that: *"The legislature and everybody knows that the people do not know anything about school boundaries."*, clearly demonstrates the bad faith on the part of the Kansas Legislature in requiring that elections be held. If the people know

nothing about school boundaries, the Legislature should not have invoked the election process to function as a mere sop thrown to an unwary public and intended to constitute a "relief valve" in the political arena.

Appellants submit that the election process can never be used as a mere advisory mechanism or "relief valve" because: (1) elections are by definition determinative of the issue at hand; (2) the existence of "determinative" and "advisory" elections side by side can only have the effect of diminishing the active participation of responsible citizens in the elections actually necessary for the existence of our republican form of government at both state and national level; and, (3) "advisory" elections are alien to the concept of a government responsive to the expressed will of its people.

It is elementary that the Federal Constitution protects the right of all qualified citizens to vote, in state as well as federal elections, *Reynolds* v. *Sims*, 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964). It is equally rudimentary that the Federal Constitution guarantees each voter the right to have his ballot counted, *U. S.* v. *Mosley*, 238 U.S. 383, 59 L.Ed. 1355, 35 S.Ct. 904 (1915). These basic principles are grounded on the even more fundamental premise that elections are decisive of a given proposition. This is so because it is the people who govern:

> "The very foundation of a true democracy and the foundation upon which this nation was built is the fact that government is responsive to the views of its citizens." *Braden* v. *U. S.*, 365 U.S. 431, 5 L.Ed.2d 653 at 661-2 (1961).

> "Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation." *U. S.* v. *U.A.W.*, 352 U.S. 567 at 593 (1957).

The issue is not whether the residents of the gray-areas had the right to vote on the question of transfer. The issue, may the legislature invoke the election process, even though it has no intention of abiding by the electoral determination thereby expressed? Appellants submit that due process requires a negative answer. If a qualified citizen has the right to vote, and the right to have his vote counted, does he not have the right to have the election dispose of the issue? For what other reason is an election held if it is not to be determinative of the issue at hand?

"Advisory" elections which serve only as a "relief valve" are repugnant to our form of government, which is based on the concept of government by the people. It is beyond question that the people of this country govern. They are not mere advisors, as held by the Kansas Supreme Court. According to the Declaration of Independence and the Federal Constitution, it is the people who are sovereign and who are the very wellspring of all power. To turn them into mere advisors on public issues is to make the people the servant of government rather than its master.

Take the case at bar. Here the electors participated in the traditional process of free election on a subject of vital interest to them. The majority will was clearly expressed. Nevertheless, it was ignored as "mere advice" and one administrative official was able to overrule the majority will duly expressed through the election process. Is this not precisely the type of situation which the founding fathers sought to prevent? The answer is most assuredly "yes", and this Court now has the opportunity to stop this beginning intrusion of utter disregard for the majority will. Due process so requires.

To permit the existence of "determinative" and "advisory"[1] elections, side-by-side, not only gives impetus to

a general erosion of our democratic processes, but also discourages responsible citizen participation in elections required by our Constitutions and without which our republican form of government would not exist.

From childhood through adolescence to maturity, the American citizen is properly and necessarily nourished on the concept that elections are held to determine how the government will govern. He is taught at home, in church and in school that it is a citizen's highest duty to participate in the election process. It is essential to the Republic that citizens take seriously their right to vote if we are to achieve a government of, by and for the people. Permitting "advisory" and "determinative" elections to exist side-by-side can only lead to confusion and uncertainty.

The situation here is a good example. The legislature directed that the election process, with all of its attendant formalities, be invoked. The electors responded as model citizens. Eighty-five per cent of all eligible electors participated in what they quite properly believed to be a traditional democratic decision-making process. They left their homes, farms and places of business at their own expense of time and money. They argued, debated, studied and discussed an issue of vital interest to them—an issue they felt that had been left to their judgment. A secret ballot was taken, the results recorded and a majority view expressed. The electors had exercised their privilege and discharged their duty. But this was an election that turned out to be unlike any election with which they, as American citizens, had been familiar. Instead of deciding the controversy, *it functioned solely as a public opinion poll to advise a single administrative official!*

For the Court to place its stamp of approval upon this type of sham election would result in an attrition of re-

spect for the democratic decision-making process. Who would ever want to vote in a meaningless election, and how would a person ever know with certainty which elections were meaningful and which were not?

It is submitted that the decision of the Kansas Supreme Court is violative of the integrity of the election process by permitting its use as a mere "relief valve" or advisory device. Appellants sincerely believe that this question is substantial and of the utmost public importance.

Respectfully submitted,

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